84-1690

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JUAN R. ENRIQUEZ

v.

RAYMOND K. PROCUNIER

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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1141P

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in failing to take judicial notice of census figures establishing the underrepresentation of Mexican Americans on the grand and petit juries which indicted and convicted Petitioner.

2. Whether the Fifth Circuit erred, in the absence of any evidentiary hearing in the District Court, in rejecting Petitioner's claims that he was incompetent to stand trial.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JUAN R. ENRIQUEZ

v.

RAYMOND K. PROCUNIER

TO THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Juan R. Enriquez ("Enriquez") petitions for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of such court in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 752 F.2d 111. The opinion of the District Court (App. B), which adopts the findings and conclusions of a United States Magistrate, (App. C) has not been reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1984. Enriquez filed his petition for rehearing on January 21, 1985, after receiving an extension of time for such filing. The petition for rehearing was denied by the Court of Appeals by order entered on February 1, 1985 (App. D, infra). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

The federal habeas corpus statute, 28 U.S.C. § 2254, governs the filing and treatment of Enriquez's petition.

STATEMENT OF THE CASE

Petitioner Juan Enriquez was convicted of murder with malice on October 19, 1966, in a state court jury trial in Karnes County, Texas. Enriquez was tried in a highly publicized trial in the same county where the offense with which he was charged was committed. Enriquez pleaded not guilty by reason of insanity, but trial counsel put on no evidence of insanity or any mitigating evidence whatsoever. The death penalty was assessed; however, the sentence was commuted to a life sentence in 1972 by the Governor of Texas.

Trial counsel waived a competency hearing. Enriquez, who at the time was 18 years old, stated under questioning from

the trial judge that he did not wish to request a competency hearing. At the request of his counsel, Enriquez had been examined by a psychiatrist who had determined in a June 1, 1966, letter that Enriquez was suffering from "a significant mental illness which merits further evaluation." Such letter was received by the trial court. After further psychological evaluation of Enriquez, a June 24, 1966, letter from the examining psychiatrist (Dr. Neville Murray) went into considerably more detail of Enriquez' prolonged history of psychiatric disorders, including the following:

1. A history of severe psychiatric illness in immediate family members;

2. Evidence of a disturbed family attitude toward sexuality and social mores;

3. Evidence of a severe head injury;

4. A longstanding history of socially deviant behavior;

5. A longstanding history of explosive and impulsive behavior;

6. A longstanding history of "prolonged fantasy and dream states during which the subject is unable to differentiate between reality and fantasy phenomena."

7. A "tenuous" reality adherence in that "in relationship to reality it appears that he is lacking in common sense."

8. Generalized encephalographic abnormalities of a paroxysmal type characteristic of a convulsive disorder.

The diagnosis reached by Dr. Murray was "one of a schizophrenic disorder of a mixed type occurring in a chronic brain syndrome afflicted individual." The June 24, 1966, letter was not brought to the attention of the trial court at the time of the trial, however.

Enriquez was convicted in October, 1966, by a jury from which all Mexican-Americans were excluded, either for cause or by peremptory challenge by the State. The grand jury which indicted Enriquez likewise contained no Mexican-Americans. In 1970, Mexican-Americans constituted 41.0% of the general population and 32.6% of the voting age population of Karnes County.[1] Based upon compilations by the county clerk, between 1963 and 1966 (the only period of time for which records were available), only 72 of 732 petit jurors (9.8%), and 12 of 112 grand jurors (10.7%) in Karnes County were Mexican-American.

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1 "Characteristics of the Population - 1970," Part 45-Texas, United States Bureau of the Census, Tables 9, 35 and 129.

Petitioner's appointed counsel at trial objected to the jury selection process and unsuccessfully attempted to establish population statistics by introducing into evidence a statistical compilation by the University of Texas Bureau of Business Research which reflected Mexican-American population figures for Texas. Such exhibit was excluded on hearsay grounds because no person was called to authenticate the compilation of statistics.

Enriquez appealed his conviction to the Texas Court of Criminal Appeals, which affirmed the conviction in 1968. See Enriquez v. State, 429 S.W.2d 141 (Tex. 1968). A motion for rehearing was denied by the Court of Criminal Appeals.

Soon thereafter, Enriquez commenced habeas corpus proceedings which eventually gave rise to the instant appeal. On October 2, 1968, Enriquez filed his

original habeas corpus petition in the United States District Court for the Western District of Texas, San Antonio Division (hereinafter the "District Court"). Such petition was held in abeyance pending completion of state court habeas corpus proceedings, which were brought in 1968. The state District Court and Texas Court of Criminal Appeals denied habeas relief without hearing and without opinions. On November 18, 1969, Enriquez filed an amended federal habeas corpus petition which was denied, without a hearing, by the District Court. On appeal, the Fifth Circuit remanded the case on November 3, 1971, to the District Court pending exhaustion of state remedies. By amended order of January 12, 1972, the Fifth Circuit directed the District Court to remand the case to the state courts for

determination of state postconviction proceedings.

On May 10 and 30, 1972, the 81st State District Court, Karnes County, Texas, with the same judge presiding who presided at trial and at the earlier denial of state habeas relief, held habeas corpus hearings pursuant to federal court orders and denied relief. Although Enriquez, his trial counsel (since removed upon application of Enriquez to the Fifth Circuit) and Enriquez's uncle testified at such hearings, the state court refused to subpoena other witnesses sought to be deposed by Petitioner, including the psychiatrist (Dr. Neville Murray) who had examined Enriquez prior to trial. Petitioner's counsel at the habeas corpus hearing withdrew a request for Dr. Murray's testimony at one point during the state habeas corpus hearing, but reinstated such request after

the testimony of trial counsel concerning Dr. Murray's conclusions as to competence. The reinstated request to subpoena Dr. Murray was denied. Enriquez also sought to subpoena local newspaper editors and managers of area television and radio stations to testify about pretrial publicity and percentages of Mexican-Americans in the population, but the state court declined to issue such subpoenas. The compilation of statistics attempted to be introduced at trial was again tendered as an exhibit, but was again rejected on hearsay grounds.

On February 28, 1978, Enriquez, appearing pro se, filed a Second Amended Petition in the United States District Court for the Western District of Texas (the "District Court"), which dismissed the petition on November 28, 1981, pending exhaustion of state remedies. A new petition, which is

now before this Court, was filed on October 5, 1981. The petition sought relief under 28 U.S.C. § 2254 on a number of grounds including incompetency to stand trial, grand and petit jury discrimination, ineffective assistance of trial counsel, evidentiary errors by the trial court and erroneous denial of a change of venue motion.

After additional disputes concerning exhaustion of state remedies were resolved, Respondent the State of Texas filed an Answer and Motion to Dismiss on August 26, 1982. Enriquez also filed a separate Motion for Evidentiary Hearing seeking to obtain evidence on his claims of incompetency, grand and petit jury discrimination, erroneous denial of change of venue, and ineffective assistance of counsel.

Without any evidentiary hearing, and without specifically ruling on the Motion

for an Evidentiary Hearing, United States Magistrate Robert B. O'Connor entered Findings and Recommendations on October 28, 1982, denying the relief requested by Enriquez. Enriquez filed objections to the Magistrate's Findings and Recommendations. The Magistrate's Findings and Conclusions were adopted in an one-page order by the District Court (Judge Garcia) on November 16, 1982. Enriquez filed a Notice of Appeal, and the District Court granted leave to appeal and issued a Certificate of Probable Cause on December 17, 1982. At the request of Enriquez, appellate counsel was appointed in August, 1983. The Fifth Circuit affirmed the District Court's denial of the Petition in an opinion dated December 26, 1984. A Petition for Rehearing was denied by order of the Fifth Circuit dated February 1, 1985. Copies of the Fifth Circuit's opinion, the Fifth

Circuit's order denying rehearing, the opinion of the District Court, and the Magistrate's Findings and Recommendations adopted by the District Court are attached as appendices to this Petition.

REASONS FOR GRANTING THE PETITION

Petitioner Juan Enriquez has been denied the opportunity to present evidence on two issues - jury discrimination and competency to stand trial - where he stands a reasonable chance of success on the merits, were a hearing to be held. The lower courts' refusals to allow Enriquez to present evidence on these two important issues have left him without an opportunity to be heard on matters where existing case law dictates he is entitled, at a minimum, to a hearing.

The result reached below with respect to Petitioner's jury discrimination claims is striking when compared to results in

some of the landmark jury discrimination cases decided by this Court. By comparing 1970 census figures with statistical data compiled by the Karnes County Clerk, Petitioner has shown that significant disparities existed in the representation of Mexican-Americans on grand and petit jury venires compared to the percentage of Mexican-Americans in Karnes County. Mexican-Americans comprised 41% of the general population and 32.6% of the voting age population in Karnes County in 1970, but made up only 10.7% of the grand jury venires and only 9.8% of the petit jury venires for the three-year period prior to trial for which records are available. The resulting disparities in representation are as follows:

PETIT JURY VENIRE

General Population	41.0%
Mexican-Americans	9.8%
Disparity	31.2%
Voting Age Population	32.6%
Mexican-Americans	9.8%
Disparity	22.8%

GRAND JURY VENIRE

General Population	41.0%
Mexican-Americans	10.7%
Disparity	30.3%
Voting Age Population	32.6%
Mexican-Americans	10.7%
Disparity	21.9%

The disparities demonstrated by the evidence offered by Petitioner are well within the range of disparities which this Court has held sufficient to create a prima facie case of discrimination. See, e.g., Alexander v. Louisiana, 405 U.S. 625, 92 S. Ct. 1221 (1972) (14% disparity); Turner

v. Fouche, 396 U.S. 346, 90 S. Ct. 532 (1970) (23% disparity); Carter v. Jury Commission, 396 U.S. 320, 90 S. Ct. 518 (1970) (33% disparity); Jones v. Georgia, 389 U.S. 24, 88 S. Ct. 4 (1967) (14.7% disparity); Whitus v. Georgia, 385 U.S. 545, 87 S. Ct. 643 (1967) (18.0% disparity).

In addition to showing the degree to which Mexican-Americans were underrepresented over a significant period of time, Petitioner has easily met the remaining two elements of the three-part test established in Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272 (1977): (1) that the group to which he belongs is a recognizable, distinct class and (2) that the jury selection system is susceptible to abuse. Castaneda establishes that Mexican-Americans are a clearly identifiable class in Texas [430 U.S. at 495, 97 S. Ct. at 1280] and that the Texas "key man" system

of grand and petit jury selection is highly subjective and susceptible of abuse [430 U.S. at 497; 97 S. Ct. at 1732]. The State has not contested that these two elements are established.

Given the above facts and precedents of this Court, the Fifth Circuit was able to affirm the District Court's denial of Petitioner's jury discrimination claims (and the District Court's failure to hold an evidentiary hearing on the issue) only by totally ignoring the census data which establishes Petitioner's prima facie case. Despite the fact that the leading case on jury discrimination issues, Castaneda, is based largely upon census data of which this Court took judicial knowledge [430 U.S. at 495, 97 S. Ct. at 1280], the Fifth Circuit refused, without any explanation whatsoever, to consider the census data tendered by Petitioner.

Petitioner can only speculate as to why the Fifth Circuit refused to consider official census data. Since the census data were first tendered upon appeal, a waiver theory is possible, but unlikely due to the fact that Petitioner was represented pro se in the District Court and was denied an evidentiary hearing on jury discrimination, despite a specific request therefor by motion.

The fact that 1970 census figures were used with respect to a 1966 trial is another possible explanation for the Fifth Circuit's refusal to consider such figures, but no official 1960 census data exist as to Mexican-Americans in the population. Further, 1970 figures are actually closer in time to an October, 1966, trial than 1960 figures would have been, even if available.

As in the District Court, the Fifth Circuit's discussion of jury discrimination focused upon the failure of Petitioner's former trial counsel and state habeas corpus counsel to authenticate a compilation of population statistics which was (and is) subject to exception under the hearsay rule. That focus misses the point, however. The very purpose of the hearsay rule is to assure the reliability of evidence considered by the courts. Yet Petitioner's attempt to prove his case by official census data repeatedly found reliable by this and other courts, including the Fifth Circuit[2], was rejected without one word of explanation. Such a

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2 "Indeed, the Courts take notice of the census figures," Goins v. Allgood, 291 F.2d 692, 697 (5th Cir. 1968).

result does not square with the result or the reasoning of Castaneda, and the fundamental importance of racial discrimination issues in this Court's jurisprudence supports the granting of this Petition.

Another important issue meriting this Court's consideration in the instant case is the issue of Petitioner's competency to stand trial. Petitioner here complains of the failure of the courts below to hold a hearing at which Petitioner could have shown that, at the time of trial, he was incompetent in fact.[3]

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3 Petitioner below also argued that the state trial court's failure to conduct a competency hearing violated standards set forth in Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966). Although, Petitioner remains convinced that a Pate violation did in fact occur, Petitioner is mindful of the strict standards limiting issues reviewable on writs of ceritorari and limits his argument in this Court to the denial of his request for a hearing on competency in the District Court.

Given the extent of the conclusions reached by the examining psychiatrist, Dr. Murray, in his lengthy diagnosis of Petitioner, as set forth in the Statement of the Case above, the refusal to allow Petitioner a hearing on this issue sets a dangerous precedent of allowing a court to resolve complicated psychiatric evidence without the aid of expert medical testimony.

Dr. Murray's detailed diagnosis of Petitioner's long history of psychiatric problems and his conclusions that Petitioner suffered from a schizophrenic disorder should have prompted the District Court to allow medical evidence on the competency issue. Instead, the District Court and Fifth Circuit relied heavily on two reports by state psychiatrists who supposedly "examined" Petitioner in 1966 and the conclusion of the state trial court

as to competency. In so relying, the courts below ignored the fact that the State psychiatrists "examining" Petitioner conducted no examination at all. As instructed by his attorneys, Petitioner, who was 18 years old at the time, refused to speak to the State psychiatrists who visited his jail cell. The "examination" conducted by the State psychiatrists was no examination at all, since their conclusions relied only on Petitioner's ability to recognize them as psychiatrists sent by the State and on such sources as conversations with jailers. In addition to testifying about his own examination and diagnosis of Petitioner, a key evidentiary point on which Dr. Murray's testimony is needed is whether meaningful conclusions as to mental competence can properly be derived from the sort of "examination" done by the state's psychiatrists.

Reliance on the state trial court's impressions is likewise unavailing in determining Petitioner's competence in fact. Not only does a trial judge lack the medical knowledge to make such a conclusion unaided by expert testimony, the presiding judge at Petitioner's trial did not even have Dr. Murray's June 24, 1966, letter to consider in reaching such a conclusion. Without proper evidence of competency being introduced, the conclusion of a trial judge on the medical issue of competency itself (which is distinct from the question of whether to hold a competency hearing) is entitled to little weight.

The point Petitioner wishes to make to this Court is a simple, but important point: judicial conclusions of mental competency should be based on properly admitted medical evidence, not on unaided, independent reviews of dubious reports and

a trial judge's conclusions reached without proper foundation.

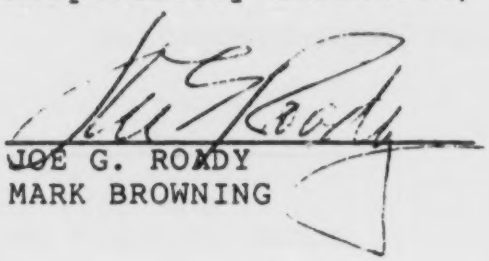
Under 28 U.S.C. § 2254(d), a requirement for presuming the correctness of a state court judgment is that the judgment was reached "after a hearing on the merits of a factual issue." Even if such a hearing was held, if a habeas petitioner can show that he did not receive a "full, fair, and adequate hearing in the State Court proceeding," the presumption of correctness disappears. In Petitioner's state court habeas corpus hearing, his request to subpoena Dr. Murray, the key witness on issues of competency, was denied. A similar request was denied by the District Court below and affirmed by the Fifth Circuit. Petitioner has yet to receive a "full, fair and adequate hearing," and the importance of preserving the constitutional standard of competency to

stand trial enunciated by this Court in Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788 (1960) supports the granting of this Petition.

CONCLUSION

To review these important questions relating to the right of a habeas corpus petitioner to present evidence essential to the claims in his petition, the petition for writ of certiorari should be granted.

Respectfully submitted,



JOE G. ROADY
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Of Counsel:

SHEINFELD, MALEY & KAY

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1056

JUAN ENRIQUEZ, Petitioner-Appellant,

versus

RAYMOND K. PROCUNIER,
Director, Texas Department
of Corrections,
Respondent-Appellee.

Appeal from the
United States District Court
for the Western District of Texas

(December 26, 1984)

Before GEE and POLITZ, Circuit Judges, and BELEW,[1] District Judge.

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[1] District Judge of the Northern District of Texas, sitting by designation.

POLITZ, Circuit Judge:[2]

The genesis of this appeal from a denial of 28 U.S.C. § 2254 habeas relief dates to April 25, 1966 when Juan Enriquez shot to death his girlfriend, her father, her brother, a woman he abducted, and a Texas Highway Patrolman. On October 19, 1966, a jury convicted Enriquez of capital murder of Kay Foss, the abductee, and imposed the death penalty. The conviction was affirmed on direct appeal. Enriquez v. State, 429 S.W.2d 141 (Tex.Crim.App. 1968). The sentence was commuted to life imprisonment. That conviction is the

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2 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

subject of the present petition. In four other proceedings Enriquez pleaded guilty to murder and received three concurrent 99-year sentences and one 25-year sentence.

The protracted history of petitioner's quest for collateral relief is convoluted. We note merely that Enriquez has filed nine state habeas applications, all of which were denied by the Texas Court of Criminal Appeals in orders dating from October 7, 1968 to November 7, 1979. That court cited Enriquez for abuse of the writ and refused to accept the tenth filing in April 1980. In the meantime, on October 2, 1968, Enriquez filed the instant petition for federal habeas. Relief was denied and Enriquez appealed. We remanded, directing the retention of jurisdiction and the deferral of any action until exhaustion of all state proceedings. After several amendments and false starts, the present

petition was denied by the district court without a hearing, based on the magistrate's recommendations.

On appeal Enriquez contends: (1) he was not competent to stand trial in 1966; (2) he was denied effective assistance of counsel; (3) extraneous offense evidence was improperly admitted; and (4) Hispanics were unconstitutionally excluded from the grand jury which indicted him and the petit jury which convicted him. Finding no merit in any contention, we affirm.

DISCUSSION

A. Competency

Enriquez's competency challenge is two-fold. First he contends that he was denied due process because the state trial court did not, sua sponte, hold a hearing to determine his competence to stand trial. In Pate v. Robinson, 383 U.S. 375 (1966), the Supreme Court held that a defendant has

a procedural due process right to a competency hearing whenever the facts before the trial court raise or should raise a bona fide doubt concerning competency. In determining whether a competency hearing is required, a trial court should give particular consideration to (1) the existence of a history of irrational behavior; (2) the defendant's bearing and demeanor at the time of trial; and (3) prior medical opinions. Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir.), cert. denied, 444 U.S. 983 (1979). A petitioner seeking habeas relief based on the trial court's alleged failure to comply with Pate, has the burden of proving that the objective facts known to the trial court were sufficient to raise a bona fide doubt as to his competency. Reese.

Enriquez has not met this burden. At a pretrial conference defense counsel submitted a letter from Dr. Neville Murray which suggested that Enriquez was suffering from significant mental illness which required further evaluation. Enriquez was examined by two psychiatrists designated by the state. After examining Enriquez these doctors reported that he was of sound mind and "aware of the nature and quality of his acts" and "capable of cooperating with his defense attorney." Before trial the judge questioned Enriquez at length and satisfied himself that Enriquez was competent to stand trial, that he understood the charges and had discussed them with defense counsel. Under these circumstances, a Pate hearing was not mandated.

Enriquez also contends that he was not competent to stand trial. Whether a state court should have conducted an evidentiary

hearing is a question separate from the core issue of the defendant's actual competence to stand trial. Zapata v. Estelle, 588 F.2d 1017 (5th Cir. 1979). Competency may be raised in post-conviction proceedings even if no competency hearing was requested by the defendant at or before the state trial. Id. When federal habeas is sought on the ground that the defendant was in fact incompetent at the time of trial, the petitioner's initial burden is substantial. "Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner. . . ." Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973), subsequent opinion, 536 F.2d 1051 (5th Cir. 1976).

The evidence of record is insufficient to raise a real and substantial doubt that Enriquez lacked mental competence at the time of his trial. Dr. Murray's letter is more than offset by the reports of the state's psychiatrists and a treating physician, the trial court's observations, and the statements of defense counsel when the competency hearing was waived.

B. Ineffective representation

Enriquez claims that he received inadequate representation from his court-appointed counsel. Specifically, he claims that his attorney failed to: (1) urge the insanity defense, (2) interview crucial witnesses, and (3) request a competency hearing. Recently, in Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court announced the burdens a petitioner must carry before this sixth amendment

complaint will justify federal habeas relief. The petitioner must show that "counsel's representation fell below an objective standard of reasonableness." 104 S.Ct.at 2065. More specifically, the convicted defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 104 S.Ct. at 2066. In ruling upon defendant's claim, the court must "reconstruct the circumstances of counsel's challenged conduct" and attempt to avoid "the distorting effects of hindsight." 104 S.Ct. at 2065. Finally, "because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 104 S.Ct. at 2065-66.

Once a defendant has shown that his counsel's conduct was deficient, he must then show that the deficient representation was materially prejudicial. In order to show prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068 The court teaches that "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Enriquez has not made either showing; we perceive neither deficient representation nor prejudice. Defense counsel investigated the competency issue and decided, for tactical reasons, that an insanity defense should not be advanced. A measure of investigation leading to a reasonable tactical decision does not fall

below the Strickland v. Washington threshold. The same reasoning applies to the decision not to request a competency hearing. Nor do we find a defect of constitutional proportions in counsel's failure to interview the witnesses to the other murders.

C. Extraneous offenses

Enriquez claims that the court erred in allowing evidence of the other murders. This argument fails. The three murders in question occurred before Enriquez abducted and murdered Kay Foss, and stole her car. The evidence was admitted to show motive, intent and identity. Enriquez v. State, 429 S.W.2d 141 (Tex.Crim.App. 1968); Ellisor v. State, 282 S.W.2d 393 (Tex.Crim. App. 1955). In this circuit, the admission of an extraneous offense into evidence is constitutionally permissible if it meets

the two tests set forth in Hills v. Henderson, 529 F.2d 397 (5th Cir.), cert. denied, 429 U.S. 850 (1976). First, there must be a strong showing that the defendant committed the offense and, second, the extraneous offense must be rationally connected with the offense charged. Id. See also, Pentecost v. Estelle, 582 F.2d 1029, 1031 (5th Cir. 1978). The admission of the evidence in this case readily passes muster. The defendant has been convicted of the extraneous offenses and they were a principal motive for the murder of Kay Foss.

D. Exclusion of Hispanics

Enriquez maintains that the make-up of the grand jury and petit jury involved in his indictment and conviction was unconstitutional. He contends that in 1966 Hispanics were systematically excluded from participation in grand and petit juries. In order to secure federal habeas relief on

this ground Enriquez must: (1) establish that the group against whom discrimination is asserted is a recognizable, distinct class, singled out for different treatment; (2) prove that the group has been under-represented over a significant period of time; and (3) support the presumption thus created by showing that the selection procedure is susceptible of abuse or is not racially neutral. Castaneda v. Partida, 430 U.S. 482 (1977); Guice D. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc). Enriquez's mere allegation of discriminatory jury selection is insufficient to require a hearing. "If . . . the petitioner has been accorded a fair and complete opportunity to adduce evidence in state court, neither the petitioner nor the state should be put to the wasteful exercise of repetition in federal court." Guice v. Fortenberry, 661 F.2d at 500.

In the present case, the state court record provides an adequate basis for resolving this claim without a hearing. Enriquez was accorded an adequate opportunity to present his evidence in the state court. We find the evidence presented insufficient to establish a prima facie case for discrimination in the grand and petit jury selection. On the first day of his trial, Enriquez filed a challenge to the array and a motion to dismiss the jury venire. During a hearing on the motion, the Karnes County District Clerk was instructed by the court to prepare a list of persons summoned on jury venires with Mexican-American surnames. These lists reflect that from 1963 to 1966, 72 of 732 petit jurors, 12 of 112 grand jurors, and 6 of 34 jury commissioners had Mexican-American surnames. At the hearing, Enriquez offered statistics as to the

percentage of Mexican-American surnames among persons living in Karnes County. Because the exhibit was not properly authenticated, it was not admitted into evidence. No further evidence was offered on this issue. On direct appeal, the Texas Court of Criminal Appeals noted that Enriquez had failed to adduce evidence as to the percentage of Hispanics in Karnes County and concluded that he had failed to show a history of discrimination. Enriquez v. State, 429 S.W.2d 141. At the state habeas hearing, the court concluded that Enriquez failed to present evidence sufficient to establish the systematic exclusion of Mexican-Americans from the grand or petit juries. Enriquez has had a fair and complete opportunity to show, and has failed to show, the Hispanic population in Karnes County in 1966; the total population in Karnes County in 1966; and the

number of Hispanic citizens and other citizens eligible to serve as jurors in Karnes County in 1966. Consequently, he has failed to establish the second element required by Castaneda: underrepresentation of Hispanics on jury panels over a significant period of time. This contention is therefore without merit.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN RUDY ENRIQUEZ	§	
	§	
V.	§	CIVIL NO. SA-81-CA-537
	§	
W. J. ESTELLE, JR.	§	
	§	

O-R-D-E-R

On this date came on for consideration by the Court Petitioner's Application for Writ of Habeas Corpus, filed in the above-styled and numbered cause, pursuant to 28 U.S.C. § 2254, on October 5, 1981. Also under consideration by the Court are the Findings and Recommendations of the United States Magistrate Robert B. O'Connor, as well as the objections thereto, if any, and after having conducted an independent review of the record in this cause, and having made a de novo determination with respect to those portions of the Magistrate's Findings and Recommendations to which objections have been made, as

required by 28 U.S.C. § 636(b)(1)(C), the Court hereby accepts and approves the Magistrate's Findings and Recommendations.

It is accordingly ORDERED that Petitioner's Application for Writ of Habeas Corpus be, and the same is hereby DENIED.

SIGNED and ENTERED this 16th day of November, 1982.

/s/
H. F. GARCIA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN RUDY ENRIQUEZ	§	
	§	
V.	§	CIVIL NO. SA-81-CA-537
	§	
W. J. ESTELLE, JR.	§	
	§	

J-U-D-G-M-E-N-T

This action came on for consideration before the Court, and the issues having been duly considered;

It is, therefore, ORDERED ADJUDGED and DECREED that Petitioner's Application for Writ of Habeas Corpus be DENIED.

SIGNED and ENTERED this 16th day of November, 1982, at 1:30 o'clock, P.M.

/s/
H. F. GARCIA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN RUDY ENRIQUEZ	§	
	§	
V.	§	CIVIL NO. SA-81-CA-537
	§	
W. J. ESTELLE, JR.	§	
DIRECTOR, Texas	§	
Department of	§	
Corrections	§	

FINDINGS AND RECOMMENDATIONS
OF THE UNITED STATES MAGISTRATE

TO: Honorable H. F. Garcia
United States District Judge

Pursuant to the informal referral of this cause on October 8, 1981, to the undersigned United States Magistrate, and pursuant to the authority vested in United States Magistrates under the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 1(d) and (f) of the Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrates, effective in the Western District of Texas on March 1, 1982, the following findings and recommendations

are submitted for your review and consideration.

I. Statement of the Case

Respondent has legal custody of petitioner pursuant to the following judgments of conviction and sentences:

1. Cause No. 3862, the conviction under attack in this application, in the 81st Judicial District Court of Karnes County, Texas, wherein a jury convicted petitioner on his plea of not guilty of the offense of murder with malice. The jury assessed punishment at death, and the Texas Court of Criminal Appeals affirmed the conviction. Enriquez v. State, 429 S.W.2d 141 (Tex. Crim. App. 1968).

On August 30, 1972, the Governor of the State of Texas commuted Petitioner's sentence from death to life imprisonment in the state penitentiary.

2. Cause Nos. 12442, 12474, 12475, and 12476, wherein Petitioner was convicted upon his pleas of guilty and nolo contendere of three offenses of murder with malice, and one offense of assault with intent to murder. The cases were tried simultaneously in the 105th Judicial District Court of Nueces County, Texas. The Court assessed concurrent sentences of ninety-nine (99) years confinement in the state penitentiary on each of the murder convictions and twenty-five (25) years

confinement on the conviction for assault with intent to murder. The judgments and sentences were entered on October 20, 1969, and petitioner did not appeal.

3. Cause No. 4117, in the 81st Judicial District Court of Wilson County, Texas, - wherein Petitioner pleaded guilty to a charge of murder with malice and was convicted on October 21, 1969. The court assessed punishment at ninety-nine (99) years confinement in the state penitentiary. Petitioner did not appeal.

Petitioner has filed nine (9) previous applications for writ of habeas corpus in the state courts of Texas, all of which were denied by the Texas Court of Criminal Appeals on October 7, 1968; December 8, 1970; November 29, 1972; October 3, 1973; October 24, 1973; April 10, 1974; February 26, 1975; April 2, 1975; and November 7, 1979, respectively. The Court of Criminal Appeals cited petitioner for abuse of the writ on April 16, 1980 and refused to file his tenth application. Ex parte Juan Rudy Enriquez, No. 2330.

Petitioner's petition production has proven no less prolific at the federal level. His combined efforts in both the Southern and Western Districts of Texas have produced the following:

1. Enriquez v. Beto, SA-68-CA-244, denied June 25, 1971; remanded by the Fifth Circuit (No. 71-2259) pending state court post-conviction procedures; dismissed November 21, 1978.

2. Enriquez v. Beto, CA-71-C-42, denied May 25, 1971.

3. Enriquez v. Beto, CA-72-CA-107, dismissed June 30, 1972.

4. Enriquez v. Beto, SA-72-CA-233, denied May 2, 1975.

5. Enriquez v. Estelle, CA-75-C-61, denied June 26, 1976.

6. Enriquez v. Estelle, R-80-401, presently pending in the United States District Court, Southern District of Texas, Houston Division.

With regard to the issue of exhaustion of available state remedies, Petitioner has exhausted as to the first six issues raised either on direct appeal or by application for writ of habeas corpus to the Court of

Criminal Appeals. As to the issues of the sufficiency of the evidence and incompetency to stand trial, this Court in an Order Denying Respondent's Motion to Dismiss for Failure to Exhaust State Remedies dated December 9, 1981, and adopted by the District Court in an Order dated July 29, 1982, found that Petitioner has raised the issue of incompetency to stand trial in his Supplemental petition to Second Amended Petition for Writ of Habeas Corpus filed in connection with habeas corpus proceedings held in 1972. With regard to the sufficiency of the evidence issue, this Court found that the holding of Smith v. Estelle, 562 F.2d 1006 (5th Cir. 1977), (where Texas Courts had clearly indicated that they would not entertain any further applications for writ of habeas corpus from the Petitioner grounded upon issues which could have been raised in past

actions, such indicated the absence of an available state remedy and excused the need for exhaustion), applied and excused Petitioner from presenting the issue by way of writ of habeas corpus to the Court of Criminal Appeals. Therefore, Petitioner has satisfied the exhaustion requirement of § 2254.

II. Jurisdiction

This Court notes jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254.

III. Issues

The issues raised in Petitioner's application are:

1. Whether people of Mexican American surnames were excluded from the grand and/or petit jury in Petitioner's trial solely on the basis of race in violation of his right to due process and equal protection of the law.

2. Whether the trial court's instruction to the Sheriff of Karnes County, a witness in Petitioner's trial, to select veniremen from which jurors were to be picked for Petitioner's trial violated Petitioner's right to due process and equal protection of the law.

3. Whether the trial court's denial of Petitioner's Motion for Change of Venue and Special Venire denied Petitioner his right to a fair trial and due process of the law.

4. Whether the introduction of extraneous offenses into evidence violated petitioner's right to a fair trial.

5. Whether the State prosecutor made improper and impermissible arguments to the jury.

6. Whether Petitioner received effective assistance of counsel.

7. Whether the trial judge refused to hold a competency hearing in violation of Petitioner's right to due process and equal protection of the law.

8. Whether there was sufficient evidence to support the verdict.

IV. Arguments and Authorities

Almost fourteen years from the date he first filed his application with this Court, petitioner has finally qualified for a determination of the merits of his claims. Without further delay, this Court makes the following findings and recommendations.

Section 2254(d) of Title 28, United States Code, (Federal Rules of Civil Procedure (Supp. 1982), provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit. . . .

The section then states eight different grounds on which the petitioner may overcome the presumption of correctness. This Court will analyze each issue presented to determine (1) Whether it is a fact issue to which the presumption of correctness attaches and (2) If the issue is not a fact issue, whether, on independent review of the records and state papers, Petitioner's allegation is meritorious.

As just noted, the findings of fact of a State court after a full and fair hearing which are evidenced in a reliable and adequate written indicia are entitled to a presumption of correctness unless the Petitioner can prove up one of the eight exceptions. For the following reasons, it is the conclusion of this Court that Petitioner has failed to carry his burden and, consequently, the findings of the State courts as to the first six issues presented by petitioner are correct.

On February 14, 1968, the Court of Criminal Appeals of Texas affirmed Petitioner's conviction in Cause No. 3862, the conviction which he attacks here. The issues raised by Petitioner in his direct appeal were as follows:

> 1. The trial court errred in declining to consolidate this case with another murder case against Petitioner in another county.

2. The trial court erred in failing to grant his Motion to Quash the Venire and Motion for Change of Venue.

3. The trial court erred in instructing the Sheriff of Karnes County, a witness in the case, to select the veniremen.

4. The trial court erred in not calling a special venire.

5. The trial court erred in allowing the exclusion of prospective grand/petit jurors on the basis of race.

6. The trial court erred in admitting evidence of extraneous offenses.

7. The trial court erred in allowing the jury commissioner to set her own qualifications for juror selection.

8. The trial court erred in unduly participating in the voir dire examination of the panel.

9. The Texas murder law is unconstitutional.

10. The trial court erred in allowing the State to challenge a prospective juror on the sole grounds that he had conscientious scruples against the infliction of the death penalty.

11. The trial court erred in failing to respond to petitioner's Motion to Require the State to provide him prior to trial all information in the possession of the State relating to prospective jurors.

12. The trial court erred in impaneling the final juror without the appellant having accepted him.

13. The trial court erred in giving a defective charge to the jury.

In comparing the points of errors raised by Petitioner on direct appeal to the Court of Criminal Appeals of Texas and the issues raised by him in his present application to this Court, it is evident that Point of Error 2, 3, 5, 6, in the former are identical to Issues 3, 2, 1, 4, of the latter, respectively. The opinion of the Court of Criminal Appeals is attached hereto as Appendix A.

On September 20, 1968, Petitioner resorted to the Karnes County District Court and filed an application for Habeas Corpus post-conviction relief, pursuant to Article 11.07, Texas Code of Criminal Procedure, 1968, as amended. The issues presented were:

1. The trial court erred in allowing the State to challenge prospective jurors for the sole reason they had scruples against the death penalty.

2. The Texas death penalty is unconstitutional.

3. The trial court erred in allowing the jury commissioner to set her own qualifications for juror selection.

4. The trial court erred in denying Petitioner' s Motion to Change Venue.

5. The trial court erred in instructing the Sheriff of Karnes County, a witness in Petitioner's case, to select the veniremen.

6. The trial court erred in allowing evidence of extraneous offenses.

7. The trial court erred in allowing the exclusion of veniremen on the basis of race.

Petitioner's post-conviction writ was denied in an Order dated September 20, 1968. A Motion for an Evidentiary Hearing was likewise denied in an Order dated November 21, 1968, the trial court finding:

> [S]ame does not contain any sworn allegation of fact which were not resolved upon the trial on the merits of this case. Points 3.A (1) and 3.A (3) of the Petitioner's Motion filed herein

were decided against petitioner in this Court after a full factual hearing had been conducted by the court prior to main trial before the jury on the merits. point of Error Number 3.A (2) is solely a question of law requiring no factual hearing. This question of law, being an attack on the Constitutionality of Article 1.14 of the Code of Criminal procedure of the State of Texas, was raised by the petitioner on the Appeal of this case, and was expressly overruled by the Court of Criminal Appeals of the State of Texas, and is now overruled and denied by this court.

Again, Point of Error 1, 2, 3, 4, 5, 6, and 7 in Petitioner's application for writ of habeas corpus post-conviction relief correspond to Point of Error 10, 9, 6, 2, 3, 7, and 5 contained in his direct appeal to the Court of Criminal Appeals. Also, point of Error 4, 5, 6, and 7 in his application filed in Karnes County for post-conviction writ of habeas corpus relief correspond to Issue 3, 2, 4, and 1 in his present application before this Court. In review, then, it becomes apparent that the first six of the eight issues presented in Petitioner's

application to this Court have been presented to and considered by a state court of Texas.

Under § 2254(d), a "hearing" has been held when both the respondent and the State were formally before the court, respondent was given an opportunity to be heard, and his claim received plenary consideration. Sumner v. Mata, 449 U.S. 539, 540, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). However, § 2254(d) only applies to cases in which a state court of competent jurisdiction has made a determination after a hearing on the merits of a factual issue. Sumner v. Mata, supra, 449 U.S. at 546. Therefore, whether the state courts' denial of Petitioner's first six issues is to be afforded the presumption of validity created by § 2254(d) depends on whether such findings are categorized as findings of fact or conclusions of law.

With regard to Petitioner's claim that jurors of Mexican American surnames were excluded on the basis of race, the Court of Criminal Appeals found:

> No history of racial discrimination was shown. Those of us charged with administration of criminal justice in this State learned our lesson fourteen years ago when the Supreme Court of the United States handed down its decision in Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866. The only records available for Karnes County show that since 1963, of the 732 petit jurors selected in said county, 72 have had Mexican American surnames; of the 112 grand jurors, there were 12 with Mexican American surnames, and of the 34 jury commissioners, six were identifiable as such. There were no statistics as to the percentage of Mexican Americans in said county, and each of the witnesses called stated that he or she did not know what percentage of the population of the county bore Mexican American surnames or were of Mexican American origin.
>
> As to this case, one Mexican American served on the jury commission which selected the grand jury that indicted appellant, and which selected a portion of the panel from which were drawn the names of those who served as jurors at appellant's trial. At least 29 people whose name were patently Mexican American were among the combined lists from which appellant's jury was drawn.

> Twenty-four were excused by the court for the various reasons that they had (1) an opinion that appellant was guilty, (2) an opinion as to his guilt or innocence, (3) an inability to understand the English language, (4) conscientious objections to the infliction of the death penalty, (5) failed to meet the statutory requirement of being a freeholder. To none of these excuses did appellant object. Four were peremptorily excused by the State and one by the appellant.

Enriquez v. State, supra, 429 S.W.2d at 143-144. Additionally, a challenge and Motion to Quash and Dismiss the Jury on this ground was overruled by the trial court. See Transcript, Vol. A, p. 26. Petitioner has offered no evidence to contradict or refute the accuracy of the statistics quoted by the Court of Criminal Appeals. Furthermore, a review of the trial transcript confirms the findings of the Court of Criminal Appeals and reveals that Petitioner did, in fact, fail to object to any of the excuses. Two years before petitioner's conviction, the Supreme

Court of the United States ruled that findings of the state court on the issue of discrimination are not binding but entitled to great respect when a claim is made in a federal habeas corpus proceeding that Negroes were systematically excluded because of their race from grand and petit juries. See Anderson v. Johnson, 371 F.2d 83 (6th Cir. 1966), affirmed 390 U.S. 456, 88 S.Ct. 1194, 20 L.Ed.2d 27, rehearing denied, 390 U.S. 1037, 88 S.Ct. 1402, 20 L.Ed.2d 298. There is no reason why the same rule should not apply when the allegation involves Mexican Americans. Therefore, it is the finding of this Court, after an independent review of the state trial records, that Petitioner's first argument is without merit and the findings of the trial court and Court of Criminal Appeals are correct.

With regard to Petitioner's claim that the trial court's instruction of the Sheriff of Karnes County, a witness in Petitioner's trial, to select veniremen from which jurors were to be selected violated his right to due process and equal protection of the law, this Court finds no merit. The Court of Criminal Appeals of Texas, responding to this allegation, stated:

> After some of the panels for the week in the court's term had been exhausted, the sheriff was then instructed by the court to summon additional veniremen. Appellant complains of this manner of selection of the remainder of the panel. There can be no merit in this contention because the court offered to have additional unused panels for the term opened and summoned, and the appellant objected, thereby leaving the court no alternative but to act as he did in compliance with the terms of Article 34.01, Vernon's Ann. C.C.P., and the holding of this Court in Taylor v. State, Tex. Cr. App., 420 S.W.2d 601.

Enriquez v. State, supra, 429 S.W.2d at 144. The finding of the Court of Criminal Appeals is substantiated by the trial

transcript. See Trial Transcript, Vol. I, pp. 10-11. Furthermore, the petitioner filed a Motion to Dismiss and Quash the Veniremen at the trial and was denied by the trial court, Trial Transcript, Vol. V, p. 1059, because the court had asked both sides during a pretrial conference if a special venire would be requested, explaining that there were two unused lists and one partially unused list available. At that time, Petitioner indicated that no special venire would be requested. See Trial Transcript, Vol. V, pp. 1060-1072. Finally, the trial court explained it would instruct the Sheriff to summons a hundred extra jurors unless Defendant and his attorneys requested to have the only unused list available summonsed. Defendant's attorneys did not so request, and the trial court instructed the Sheriff as it had stated it would. See Trial Transcript, Vol. V,

pp. 1070-1071. Finally, Defendant's attorneys objected to the opening and summonsing of the unused panels, thereby forcing the trial court to act as it did. Therefore, Petitioner's second argument is without merit.

Petitioner next argues that the trial court denied his right to a fair trial by denying his Motion to Change Venue. Petitioner alleges coverage by the news media and the exposure of the jurors to such coverage precluded the possibility of his receiving an unbiased jury. With reference to this argument, the trial court purposely delayed the trial of petitioner for almost two months in order to allow the publicity to subside. Further, the trial court was presented with the affidavits of W. B. Burris and Helmuth Schuenemann in connection with this motion which stated that they were familiar with the publicity

attached to the case, and that, based on that knowledge, they did not believe Defendant could receive a fair trial. See Trial Transcript, Vol. A, pp. 39-40. Neither man stated what publicity he had been exposed to or what qualifications he possessed for making such a judgment. In reply, the State filed the controverting affidavits of Julio D. Perez, Pryor L. Hammack, and Taylor Brite, which stated they were "cognizant of their (Burris and Schuenemann) means of knowledge of the matters stated by them in their said affidavits," and that said means of knowledge were not sufficient to support the statements they had made in their affidavits. See Trial Transcript, Vol. A, pp. 41-43. Defendant also offered the entire voir dire of prospective jurors in support of his motion. This Court has studied the voir dire portion of the trial

transcript and finds no support for Petitioner's argument therein. Those jurors who stated they had hear, [sic] seen, or read reports about Petitioner's case and had formed an opinion about the case which would influence their decision were excused. Furthermore, Petitioner was not limited, as he contends, in his peremptory challenges. He was, in fact, granted two more challenges than the number called for by statute. Accordingly, Petitioner's third argument is found to be without merit.

Petitioner's fourth argument is that the State introduced evidence of extraneous offenses, to-wit; the murder of Victoria Perez, her brother, Frederico Perez, and their father, Frank Perez, on April 25, 1966, the same day Kay Foss, for whose murder Petitioner was standing trial, was murdered. The Court of Criminal Appeals, in response to this argument, stated:

> The murders allegedly committed by appellant within a few hours prior to the instant homicide were clearly admissible under the holdings of this Court in Ellisor v. State, 162 S.W.2d 393, and the murder committed by him within an hour after this homicide was clearly admissible under our holdings in Cox v. State, 170 Tex.Cr.R. 128, 338 S.W.2d 711; Lassiter v. State, 135 Tex.Cr.R. 352, 120 S.W.2d 262; and Chadd v. State, 114 Tex.Cr.R. 1, 23 S.W.2d 373.

Enriquez v. State, supra, 429 S.W.2d at 144. As noted by Petitioner, the State informed the trial court it intended to use the evidence of the three extraneous offenses to prove motive, intent, and identity of Petitioner in proving the instant murder with which he was charged by circumstancial evidence. It is apparently Petitioner's argument that the State failed to prove up the three extraneous offenses beyond a reasonable doubt and, therefore, they were erroneously admitted. This Court has read the testimony of Ben Flores (Trial Transcript, Vol. VIII, pp. 1703-1752),

Consuelo Flores (Trial Transcript, Vol. VIII, pp. 1753-1771), Ted Jolly (Trial Transcript, Vol. VIII, pp. 1772-1783), and Maria Menchaca (Trial Transcript, Vol. VIII, pp. 1789-1818), and Evelyn Seals (Trial Transcript, Vol VIII, pp. 1819-1829). As a result of such review, this Court concludes that the evidence was properly admitted for the purposes of showing, motive, intent and identity. Combined, the testimony of these witnesses established that Petitioner was seen at the Perez house between 8:00-8:30 a.m. on April 25, 1966; that he was seen running from the house with a pistol in his hand almost immediately after gunshots were heard; that he forced Ben Flores and his father to drive him to Corpus Christi at gunpoint; that he arrived in Corpus Christi at 9:30 a.m. where he entered the automobile of Maria Menchaca at gunpoint; that

he forced Miss Menchaca to drive him to Beeville; that at approximately 11:30 a.m. he was seen getting into the automobile of Miss Kay Foss by Miss Menchaca and Evelyn Seals on Highway 181. All five witnesses' testimony, then, establish an unbroken link which placed petitioner at the Perez house immediately prior to and after their murder and last placed him entering the car of Kay Foss shortly before she was killed. Based on this and the fact that no evidence was offered by Petitioner to refute such testimony or at least establish an alibi, a jury could easily conclude beyond a reasonable doubt that Petitioner committed the murders at the Perez house and that that was his motive for abducting and eventually murdering Kay Foss that same day.

Furthermore, in Woods v. Estelle, 547 F.2d 269 (5th Cir. 1971), the Fifth Circuit Court of Appeals was confronted with the

identical argument. In Woods, the trial court admitted the testimony of one Leo McWilliams to the effect that he had been robbed by the defendant and his two accomplices just a few hours after the robbery for which Woods was eventually convicted. McWilliams also testified as to the manner in which he was robbed, the method being identical to the method used to commit the robbery for which Woods was convicted. The Fifth Circuit, in a per curiam opinion, held the admission of McWilliam's testimony to be, at most, harmless error, stating:

> The mere violation of evidentiary rules does not in itself invoke habeas relief. Hills v. Henderson, 5 Cir. 1976, 529 F.2d 397. In Hills we recognized that the admission of evidence in violation of evidentiary rules would not necessarily mandate federal habeas relief.

Woods, supra, 547 F.2d at 271. The Court of Appeals then set out the standard announced in Hills.

> The question before us is not whether the trial court's ruling would have led to a reversal if Hills had been tried in the federal system. Nor is it sufficient that the state evidentiary rules appear to us not to have been followed. Hackworth v. Beto, 434 F.2d 852 (CA 5, 1970); Manning v. Rose [507 F.2d 889 (6th Cir. 1974)], supra, at 892. As we have held in another case involving the same Louisiana statute under which the evidence was offered, "the admissibility vel non of the evidence under state law is not determinative of a federally protected right." Brent v. White, 398 U.S. 1134, 89 S.Ct. 998, 22 L.Ed.2d 130 (1969). We examine the record in this case only to determine whether the error was of such a magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause. Heads v. Beto, 968 F.2d 240 (CA5, 1972), cert. denied, 410 U.S. 969, 93 S.Ct. 1454, 35 L.Ed.2d 704 (1973). As a guideline to applying the criterion of "fundamental fairness," we have said that the erroneous admission of prejudicial evidence can justify habeas corpus relief if it is "material in the sense of a crucial, critical, highly significant factor." Corpus v. Beto, 469 F.2d 953 (CA 5, 1972), cert. denied, 414 U.S. 932, 94 S.Ct. 236, 38 L.Ed.2d 162 (1973).

Woods, supra, 547 F.2d at 271, quoting Hills v. Henderson, 529 F.2d 397, 400 (5th Cir. 1976).

With that standard in mind, this Court has, as noted above, reviewed the pertinent testimony relating to the extraneous offenses. As a result, this Court, like the Court of Criminal Appeals, finds that the testimony was properly admitted for the purposes stated by the State. Therefore, Petitioner's fourth argument is found to be without merit.

Petitioner's fifth argument is that the State prosecutor made improper and impermissible arguments to the jury. In Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976), cert. denied. 429 U.S. 981, 97 S.Ct. 495, 50 L.Ed.2d 590, the Fifth Circuit Court of Appeals was faced with the same argument. In Zilka the Petitioner argued that the prosecutor was allowed incorrectly to bring out on cross-examination two prior felony convictions which were invalid. Rejecting Petitioner's argument that such error

automatically required habeas relief, the Fifth Circuit, Roney, J., held:

> [W]e hold that a conviction will not be set aside on a petition for writ of habeas corpus even though prior counselless felony convictions, unconstitutionally void under Gideon, were used for impeachment of the defendant, if the error is harmless beyond a reasonable doubt.
>
> Applying the harmless error rule to this case, the conviction must stand if, upon a reading of the trial record, the court is firmly convinced that the evidence of petitioner's guilt was overwhelming and that the jury would have reached the same result without the tainted evidence. Unlike our recent case of Null v. Wainwright, supra, the evidence in this case is circumstantial, rather than direct. The harmless error rule has been applied, however, in circumstantial evidence case. See United States ex rel. Satz v. Mancusi, 414 F.2d 90 (2d Cir. 1969); cf. Fontaine v. California, supra, 390 U.S. 590, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968).

Zilka, supra, 529 F.2d at 392.

The reference in the arguments to which petitioner objects was to his murder of the Perez family members. See Trial Transcript,

Vol. XI, pp. 2404-2427. Granted, the closing arguments of the State prosecutor were emotional. However, it is the conclusion of this Court that, excluding such argument, the jury would have reached the same verdict in light of the overwhelming circumstancial evidence presented against the Petitioner and his failure to present any defense at all. Furthermore, Petitioner's attorneys objected to the argument contained at p. 2405 and were sustained, the court instructing the jury not to consider the objectionable argument for any purpose. In light of the prompt action of the trial court and the instruction to the jury to disregard the statement any prejudiced [sic] effect created by the argument was removed. Little v. State, 567 S.W.2d 502, (Tex.Cr. App. 1978); Lafoon v. State, 543 S.W.2d 617 (Tex.Cr.App. 1976); Ramos v. State, 419 S.W.2d 359 (Tex.Cr.App. 1967).

With respect to the other argument (Trial Transcript, Vol. XI, pp. 2426-2427), the trial court overruled the objection by Petitioner, noting that the jury would be governed by the charge and the evidence. The Court of Criminal Appeals did not directly address this argument, apparently believing that this issue was mooted by its ruling on the admissibility of the extraneous offenses which were the focus of the arguments. An independent review of the record, however, compels this Court to conclude that admission of the second argument, if error, was harmless beyond a reasonable doubt and the jury, even if such argument had been excluded, would have reached the same result. Therefore, Petitioner's fifth argument is without merit and denied.

Petitioner next argues that he received ineffective assistance of counsel. Petitioner has already been accorded an evidentiary hearing on this issue by the trial court in connection with his post conviction application for writ of habeas corpus. Over 500 pages of testimony were transcribed, most of it focusing on this particular issue. Whether this Court can presume the findings issued by the state court are correct depends, however, on whether they are categorized as findings of facts or conclusions of law.

Every ineffective assistant [sic] claim must, at bottom, be founded on allegations of "what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of the narrators. . .'" Washington v. Watkins, 655 F.2d 1346, 1351 (5th Cir. 1981), quoting Townsend v. Sain, 372 U.S.

293, 309 n.6, 83 S.Ct. 745, 755 n.6, 9 L.Ed.2d 770 (1963), quoting Brown v. Allen, 344 U.S. 443, 506, 73 S.Ct. 397, 946, 97 L.Ed. 469 (1953). But every ineffective assistance claim also requires the application of principles of federal law to the "basic, primary, or historical" facts of the case. Washington, supra, 655 F.2d at 1352. Accordingly, whether a defendant has enjoyed effective assistance of counsel is a mixed question of fact and law. Id. at 1354. Thus, such questions do not fall within § 2254(d)'s presumption of correctness. Townsend v. Sain, supra, 372 U.S. at 309 n.6, 83 S.Ct. at 755 n.6. Therefore, it is the task of this Court to make an independent determination of this issue.

In support of his argument Petitioner cites five specific instances which he claims constitute ineffective assistance. They are:

(1) Failure to conduct an adequate pre-trial investigation.
(2) Failure to present crucial evidence on the Motion to Quash the indictment and the jury panel and the Motion to Change Venue.
(3) Failure to investigate adequately and present the defense of insanity.
(4) Failure to raise the defense of incompetency to stand trial.
(5) Failure to file adequate trial and appellate briefs.

Each issue requires separate discussion.

In the Fifth Circuit the standard for effective assistance of counsel is not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Washington, supra, 655 F.2d 1346, MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); adhered to in pertinent part on rehearing en banc, 289 F.2d 928, cert. denied 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (emphasis by MacKenna panel).

The methodology for applying this standard involves an inquiry into the

actual performance of counsel conducting the defense and a determination of whether reasonably effective assitance [sic] was rendered based on the totality of circumstances in the entire record. Washington, supra, 655 F.2d at 1355, quoting Washington v. Estelle, 648 F.2d 276, 279 (5th Cir. 1981) (emphasis in original). The standard does not vary in accordance with whether counsel was retained or appointed. Id., quoting Cuyler v. Sullivan, 446 U.S. 335, 344-345, 100 S.Ct. at 1716 (1980).

Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his care are cornerstones of effective assistance of counsel. Id., quoting Gaines v. Hopper, 575 F.2d 1147, 1149-1150 (5th Cir. 1978) (affirming grant of habeas relief on the grounds that attorney's failure to conduct adequate

investigation, including failure to interview known witnesses, deprived defendant of viable defense that he might otherwise have asserted). Therefore, court-appointed counsel have a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings and laws involved. Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979), cert. granted 441 U.S. 960, 99 S.Ct. 2403, 60 L.Ed.2d 1064, on remand, 498 F.Supp. 793.

Thus, the court-appointed attorney has a duty to conduct a proper investigation, which, at a bare minimum, includes interviewing potential witnesses, whether suggested by the defendant or listed in the indictment. Rummel, supra, 498 F.Supp. at 795, quoting Gaines v. Hopper, 430 F.Supp. 1173, 1178 (M.D.Ga. 1977), affirmed 575 F.2d 1147 (5th Cir. 1978). This duty to investigate and prepare is, however, far

from limitless, and not every breach thereof will mean that counsel has failed to render reasonably effective assistance. "[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." Washington, supra, 655 F.2d 706, 708 (5th Cir. 1980). "Reasonably effective assistance" must be judged from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question. Further, even when counsel's investigation and preparation are determined to have been seriously inadequate, there must be a showing that the habeas petitioner was to some degree prejudiced thereby. Id.

With regard to the first allegation, that of failure of counsel to conduct an adequate investigation, this Court has

reviewed the testimony given during a hearing on Petitioner's Motion to Quash the Indictment and the Jury with respect to the issue of discrimination against Mexican Americans in the selection of grand and petit jurors. See Trial Transcript, Vol. II, pp. 17-63. It has also reviewed the entire voir dire examination. The only conclusion that can be reached is the same one reached by the trial court and the Court of Criminal Appeals. There is no indication of a pattern of systematic exclusion or discrimination against Mexican Americans on the basis of race in the selection of grand or petit jurors. Rather, those Mexican Americans that were excluded were excluded for the various reasons that they had (1) an opinion about Petitioner which would influence their decision (2) an opinion that Petitioner was guilty (3) a conviction against the imposition of the

death penalty (4) an inability to understand English or (5) failed to meet the statutory requirement of being a freeholder. Furthermore, with reference to Petitioner's argument that counsel failed to discover and present evidence of the publicity given the case, the trial transcript reflects that Petitioner's attorneys closely questioned each prospective juror as to his/her exposure to publicity concerning the case and whether such exposure had influenced him/her to form an opinion about Petitioner's innocence or guilt. Additionally, the trial date was delayed by the trial court for nearly four months in order to allow whatever effect the publicity might have had to subside. Finally, a reading of the evidentiary hearing transcript (Habeas Corpus, Vo. II and III), particularly the testimony of Walter Long, reveals that the attorneys, at the time of

the trial, believed, based on their personal knowledge of the publicity given the case in the local community, that it would not be possible to pick a jury and, therefore, there was no need to file a Motion to Change Venue. Not until after they had partially completed voir dire, according to Mr. Long, did they realize that a jury might be selected despite the fact that most the prospective jurors admitted to some exposure to some media publicity about the case. Obviously, then, the attorneys for Petitioner were familiar with the publicity attendant to the trial and, as part of the trial strategy, decided that the responses which they would bring out on voir dire would prevent the selection of a jury and force a change of venue. Granted, in hindsight that may not have been a wise strategy, but, as noted earlier, the effectiveness of assistance of counsel must be

judged from the perspective of the attorney, based on all the circumstances as they were known to him at the time of trial. Applying that standard, this Court can find no fault in Petitioner's attorneys' preparation or presentation of either the Motion to Quash the jury panel and indictment or the Motion to Change Venue.

Petitioner also alleges his attorneys were ineffective because they failed to interivew Juanita Davila, Damiana Perez, and Amelia Perez. Petitioner had an opportunity to pursue this point during the evidentiary hearing held in trial court on his application for post-conviction habeas relief at which both Mr. Long and Mr. Foster testified. He did not do so. Furthermore, petitioner has failed to give this Court even a hint as to what any of these witnesses would have testified to or what harm he suffered by their not testifying. He in

no way shows or suggests that their testimony would have controverted the evidence put on by the State or would have changed the outcome of his trial. As was stated by the Fifth Circuit in Washington v. Watkins, supra:

> The law of our circuit is as yet unclear as to the precise degree of prejudice that a defendant must demonstrate before he is entitled to habeas corpus relief on grounds that he received ineffective assistance of counsel, although it is clear that some degree of prejudice must be shown. We need not decide what degree of prejudice is necessary, however, for Washington has failed to demonstrate that any prejudice whatsoever accrued from Reeve's failure to interview Hondo and Cobb prior to Washington's trial: given that Reeves would not have been able to suppress the in-court identifications of Washington even if had he interviewed them prior to trial, we perceive no way in which Washington's trial would have differed had Reeves conducted such interviews.

Id. at 1362-1363. Petitioner's argument fairs [sic] no better than that of Mr. Washington on review. He has not shown that his attorneys even knew about the

three witnesses. He has not even suggested what the substance of their testimony would have been had they testified. Finally, he has shown no prejudice in the sense that the verdict would have been different had they testified. Therefore, Petitioner's argument must be rejected as being without merit.

Petitioner next argues that his counsel was ineffective by failing to investigate adequately and raise the defense of insanity. The testimony of Mr. Long at the the [sic] evidentiary hearing (Habeas Corpus, Vol. II, pp. 93-113) relating to the issue of sanity and the voir dire questioning totally refute this argument. Combined, Mr. Long's testimony and the questioning at voir dire show that Petitioner's attorneys moved for and were granted permission of the trial court to submit Petitioner to a mental examination at Robert B. Greene

Hospital in San Antonio. As a result of those tests, Dr. Neville Murray diagnosed Petitioner as an individual suffering from a "schizophrenic disorder of a mixed type occurring in a chronic brain syndrome affected individual." However, the most Dr. Murray would testify to in court under oath when questioned about his diagnosis by Petitioner's attorneys was that he had "a reasonable doubt" as to the ability of the Petitioner to distinguish between right and wrong. He stated that he could not testify conclusively that Petitioner did not know the difference between right and wrong. See Habeas Corpus, Vol. II, p. 101. Furthermore, two psychiatrists from the State had examined petitioner as had two other psychiatrists. The conclusion of all four doctors--Dr. Benjamin Sherrer, Dr. Alfred Vogt, Dr. J. B. Potter and Dr. Alfred H. Hill--was the same: Petitioner

was sane and knew the difference between right and wrong and was competent to stand trial. See Habeas Corpus, Vol. II, p. 103. Based on the unconvincing opinion of Dr. Murray as opposed to the four reports submitted by the State, Petitioner's attorneys elected not to raise the defense of insanity. Petitioner has not presented this Court with any reports or evidence which were known to his attorneys at the time of trial which would indicate that their decision to not raise the insanity defense was not reasonable. Finally, the voir dire questioning relevant to this issue and the responses of the prospective jurors thereto indicate that many of them had some difficulty in grasping the technicalities of such a defense or else were predisposed against finding an individual not guilty on the grounds of insanity. Based on all these facts, this Court cannot

but conclude that the decision of Petitioner's attorneys to not raise the insanity defense was reasonable. Therefore, Petitioner's argument is without merit.

In the same vein, Petitioner attacks the effectiveness of his attorneys on the grounds they failed to raise the issue of competency to stand trial. Petitioner argues that the letters of Dr. Murray dated June 1 and June 24, 1966 informed his attorneys of his incompetence to stand trial. This Court has read both letters, attached as Appendix B to this report, and nowhere finds any opinion one way or the other as to the competency of Petitioner to stand trial. Both letters, particularly that of June 24, deal only with the question of Petitioner's sanity. Therefore, these letters do not constitute notice in any fashion, shape, or form of petitioner's competency or incompetency to stand trial.

Furthermore, at the final pre-trial conference held on September 16, 1966, the trial court questioned Petitioner at length with regard to whether he had discussed the charges against him with his attorneys, whether he understood the proceeding being held at the time, whether he understood the possible penalites [sic] involved if found guilty, and whether he he felt he was competent to stand trial. The answer to all questions was in the affirmative. See Trial Transcript, Vol. I, Proceedings of September 16, 1966, pp. 2-5. Further, Petitioner specifically acknowledged his understanding that he had a right to a separate hearing on the question of his competency to stand trial and expressly waived such right in open court. See Trial Transcript, Vol. I, Proceedings of September 16, 1966, pp. 4-5. Finally, it was the

recollection of Mr. Foster at the evidentiary hearing in Karnes County that he and Mr. Long decided not to raise the issue of incompetency and, in fact, filed a written declaration that no such hearing was asked for or required based on their personal observation and interaction with Petitioner throughout their preparation for trial. See Habeas Corpus, Vol. III, pp. 335-337. This declaration was in fact read into the record immediately prior to the trial court's abovementioned questioning of Petitioner as to his personal belief of his competency or the need for a hearing to decide the issue. This Court is at a loss as to understand how, given these circumstances, petitioner's attorneys should have concluded that the issue of competency should have been raised. Petitioner's argument is without merit.

Petitioner's fifth and final argument in support of his allegation is that his attorneys failed to file adequate trial and appellate briefs. This Court has read the briefs filed by Petitioner's attorneys both at the trial itself and on appeal. The impression left is that the attorneys, given the facts of the case and what transpired at trial, researched and briefed the issues adquately. The fact that an Anders brief was filed on appeal is no indication, as Petitioner seems to suggest, of the diligence and effort of the attorneys in preparing the briefs. It is the observation of this Court that Petitioner's attorneys were briefing and arguing points of error which often unable [sic] to be supported by the trial record. As to Petitioner's complaint of the lack of authorities in his appellate brief, the fact of the matter is that no authority

exists for many of the propositions offered. Furthermore, the attorneys obtained a hearing on the issue of discrimination of Mexican Americans in the selection of grand and/or petit jurors. The fact that the issue was resolved against Petitioner does not indicate that his attorneys failed to adequately brief this point.

As for Petitioner's claim that his attorneys failed to raise meritorious claims of error, the Court of Criminal Appeals expressly addressed the issue of admission of extraneous offenses. His argument as to his attorneys' failure to raise the issue of improper arguments on appeal is misleading. The argument of which Petitioner complains focused on his commission of the extraneous offenses. Therefore, it was part and parcel of the overall objection to the admission of the extraneous offense. In turn, then, the

Court of Criminal Appeals' opinion that the admission of the extraneous offenses was correct would likewise apply to the correctness in allowing the closing argument with reference to such offenses. Therefore; Petitioner's argument on this point is without merit.

Petitioner's seventh argument is that the trial court denied his right to due process and equal protection of the law by not ordering a separate hearing on his competency to stand trial. This issue has been discussed at length in conjunction with Petitioner's claim of ineffective assistance of counsel. However, this Court will briefly address the three instances which Petitioner claims should have placed the trial court on notice as to his incompetency to stand trial.

The first instance which should have at least raised a doubt in the trial court's

mind as to Petitioner's competence, argues petitioner, was a statement by his attorneys in their Motion for Defendant to be Transported to Hospital for Examination that there was "within their knowledge enough belief of the defendant's present insanity to require... testing to determine if there exists any organic injury to the brain of the defendant." Trial Transcript, Vol. A, p. 17. This Court rejects Petitioner's argument that such a statement should have raised a doubt as to his competency. The requested examination was solely for the purpose of determining petitioner's sanity, that is, his ability to know the difference between right and wrong. There is no indication in the motion that the attorneys also were requesting Petitioner to be examined as to his competency to stand trial, that is, his ability or

inability to understand the trial proceedings, the charges against him, the possible penalties if he was convicted, and his ability or inability to communicate with and understand his attorneys. Furthermore, as noted earlier, Petitioner was questioned at length as were his attorneys as to whether he or they felt Petitioner was competent to stand trial or if there was a need to hold a separate hearing to determine his competency. Both Petitioner and his attorneys signified that Petitioner was competent to stand trial and that they would request no separate hearing to establish his competency.

Petitioner also cites the letter of June 1, 1966, wherein Dr. Murray states that Petitioner was "suffering from a significant mental illness," as notice of the Petitioner's possible incompetency to stand trial. However, a reading of the letter of

June 24, 1966, and the diagnoses therein reveal that Dr. Murray had examined Petitioner with reference only to his sanity. It is well settled law that an individual suffering from some form of insanity can nevertheless be perfectly competent to stand trial. See Acosta v. Turner, 666 F.2d 949, 958 (5th Cir. 1982). As was stated by the Acosta court:

> The Supreme Court has not attempted to promulgate a standard describing the quantum of doubt that must exist before a trial judge is required to hold a Pate hearing. (citations omitted). Under Fifth Circuit law several standards have been enunciated. The most commonly used is that a Pate hearing is required if the evidence known to the trial judge creates a "bona fide doubt" as to competency. (citations omitted). The required level of doubt has also been referred to, however, as "substantial," U.S. v. Hayes, 89 F.2d 811 823 (5th Cir.) cert. denied, 444 U.S. 847 100 S.Ct.93 62 L.Ed.2d 60 (1979); Tyler v. Beto, 391 F.2d 993, 997 (5th Cir. 1968), cert. denied, 393 U.S. 1030, 89 S.Ct.642, 21 L.Ed. 2d 574 (1969); See Lee v. Alabama, 386 F.2d 97, 105 (5th Cir. 1967) (en banc), cert. denied, 395 U.S. 927, 89 S.Ct.1787, 23 L.Ed.2d 246 (1969) and sometimes more emphatically as "real, substantial, and legitimate

doubt," Pedrero v. Wainwright, 590 F.2d 1383, 1387-88 (5th Cir.1979), cert. denied, 444 U.S. 943, 100 S.Ct.299, 62 L.Ed.2d 310 (1980), or as evidence sufficient to "clearly and unequivocally create reasonable doubt," Grissom v. Wainwright, 494 F.2d 30, 32 (5th Cir.1974). Thus, as in other areas of constitutional law, no single phrase has yet evolved that captures all nuances of the contours of Pate, and so a close review of the facts is required, that we may make our independent constitutional assessment of whether sufficient doubt of competency existed within the time frame of the trial and immediately related proceedings, Reese v. Wainwright, 600 F.2d 1085, 1093 (5th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct.487, 62 L.Ed.2d 410 (1979), that the trial court was required to make a determination of Acosta's competency.

Acosta, supra, 666 F.2d at 954. Neither the statement by Petitioner's attorneys nor the letters of Dr. Murray raise a doubt of any kind in this Court' s mind as to the Petitioner' s competency.

However, Petitioner further argues that an alleged attempt at suicide by himself which was brought to the attention of the trial court by letter from a Dr. Potter

which should have raised a doubt as to his competency. A thorough search of the Statement of Facts and Exhibits by this Court has failed to turn up any such letter from Dr. Potter or any mention of such letter during the proceedings of September 16, 1966. Furthermore, in its Findings of Fact and Conclusions of Law, page 62, the trial court, referring to the proceedings of September 16, 1966, states:

> The Court had opportunity to observe the Petitioner during all of the pre-trial conferences, and had inquired of him as shown by the records above converning (sic) his consultation with his attorneys, whether or not he understood the charges, and was advised of his rights, and from such observations it was apparent to the Court that Petitioner fully understood the charges, was an alert, intelligent individual who understood the proceedings, and who stated that he understood the proceedings. From such observations and from information available at that time the Court was of the opinion at that time, and is of the opinion now that he was fully competent to stand trial, and that he fully understood his rights to such preliminary hearing, and that he fully understood the report of Dr. Neville Murray, the psychiatrist who

> examined him, and that such report had been discussed with him by his attorneys, and that he knowingly and intelligently waived his right to have a preliminary hearing on his competency to stand trial.

Based on this and a study of the pre-trial proceedings, this Court is unable to discern any events or facts which should have alerted the trial court as to any doubts about the competency of Petitioner to stand trial. With reference to the letter from Bexar County Sheriff W.E. Hauck to Karnes County Sheriff Alger Kendall, this Court has read that letter as well as the transcript of the hearing on Sheriff Kendall's request to have petitioner moved to Live Oak County Jail. See After Trial Proceedings, pp.2929-2946. While it is true that Sheriff Hauck's letter mentions Petitioner's refusal to eat, the testimony given by Sheriff Hauck reveals that his concern in requesting that Petitioner be transferred to Live Oak County Jail was that he could

not provide a guard twenty hours a day to watch Petitioner to prevent his being assaulted or to prevent someone from smuggling him a weapon or an instrument by which he could escape from the Karnes County Jail. There is no indication whatsoever that Petitioner's mental stability was a cause for the request by Sheriff Hauck to have Petitioner removed from the Bexar County Jail or the request by Sheriff Kendall to have him moved to Live Oak County Jail. Accordingly, Petitioner's seventh argument is found to be without merit.

Petitioner's final argument is that there was insufficient evidence to support the verdict. In a nutshell, Petitioner's argument is that the State failed to prove beyond a reasonable doubt that the Perez family members were murdered and/or that he (Petitioner) killed them. The most that

the evidence shows, he argues, is that he was seen running from the Perez house with a gun in his hand and that two people were found dead in that house a short time later. It is the opinion of this Court that the evidence shows something much more than this.

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Jackson v. Virginia, 943 U.S. 307, 315 (1979), quoting In re Winship, 397 U.S. 358, 364. Therefore, in a challenge to a state conviction brought under 28 U.S.C. § 2254, which requires a federal court to entertain a state prisoner's claim that he is being held in "custody in violation of the Constitution or laws or treaties of the

United States," the applicant is entitled to relief if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson, supra, 443 U.S. at 324. However, this inquiry by the federal habeas corpus court does not require the court to "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." Jackson, supra, 443 U.S. at 318-319, quoting Woodby v. INS, 385 U.S. at 282 (emphasis in Jackson opinion). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, supra, 443 U.S. at 319, quoting Johnson v. Louisiana, 406 U.S. at 362 (emphasis in Jackson opinion). With

that standard in mind, this Court addresses Petitioner's challenge to the sufficiency of the evidence.

As noted earlier in reference to Petitioner's argument that the trial court incorrectly allowed the admission of the extraneous offenses, there was testimony from several witnesses which, in capsule form, established that Petitioner was seen at the Perez house immediately before gunshots were heard; that he was seen running from the house with a pistol in his hand almost immediately after the gunshots were heard; that he forced Mr. Flores and his son to drive him to Corpus Christi at gunpoint; that he forced Maria Menchaca to drive him to Beeville at gunpoint; and that he was seen getting into an automobile, which two witnesses identified as being identical to the one owned by Kay Foss, with a woman who was identified as Kay Foss.

Furthermore, the testimony of Sheriff Ted Jolly was to the effect that a cartridge box for twenty-two (.22) caliber bullets, the same type of bullets which were used to kill the Perez family members and Kay Foss, was found on the floorboard of Petitioner's vehicle which was parked next to the Perez house. Additionally, Petitioner was described as carrying a pistol identical to the one offered into evidence by the State. Said pistol was a .22 caliber pistol. Petitioner, on the other hand, offered no witnesses or any type of defense in response.

It is the opinion of this Court that any trier of fact, given the testimony and evidence presented by the State and the total failure of Petitioner to question the credibility of any of the witnesses or present any defense, could have found beyond a reasonable doubt that Petitioner murdered

the Perez family members and that that was his motive for fleeing the scene and forcing his way into Kay Foss's automobile at gunpoint. It is further the conclusion of this Court that any trier of fact could have found beyond a reasonable doubt that he murdered Kay Foss in order to prevent her from later contacting local law officers and identifying him as being the same individual seen only hours earlier fleeing the Perez house where the Perez family members were murdered. Accordingly, it is the finding of this Court that Petitioner's final argument, as all of his prior arguments have been found to be, without merit.

V. Recommendations

It is the recommendation of this Court that petitioner's Application for Writ of Habeas Corpus be in all things DENIED. It is the additional recommendation of this Court that any future application for writ

of habeas corpus filed by this Petitioner be dismissed as constituting an abuse of the writ. Petitioner has been provided ample time and opportunity to present his case. All his arguments have received plenary consideration. There is no point in any further discussion of this case. Petitioner has had his day in court.

CERTIFICATE OF SERVICE
AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this United States Magistrate's Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to 28 U.S.C. § 636 (b)(1) (Supp. 1982) and Rule 4(b) of the Local Rules for the Assignment of Duties to United States Magistrates, any party who desires to object to this report must file written objections to the Memorandum and Recommendation within ten (10) days after

being served with a copy. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report shall bar the party from a de novo determination by the District Court of those proposed findings and recommendations. See generally United States v. Raddatz, 447 U.S. 667, 673-676 (1980); 28 U.S.C. § 636 (b)(1) (Supp. 1982). Additionally, any failure to file written objections to the proposed findings and recommendations contained in this Memorandum and Recommendation, within ten (10) days after being served with a copy, shall bar the aggrieved party from appealing the factual findings of the Magistrate that are

accepted or adopted by the District Court, unless the party validly alleges grounds of plain error or manifest injustice. See Nettles v. Wainwright, 677 F.2d 404, 408-410 slip op. (No. 80-5596) 151529 (5th Cir. 1982) (en banc).

SIGNED and ENTERED this 28th day of October, 1982.

/s/
ROBERT B. O'CONNOR
United States Magistrate

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1056

JUAN ENRIQUEZ,

Petitioner-Appellant,

versus

RAYMOND K. PROCUNIER, Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(February 1, 1985)

Before GEE, POLITZ, Circuit Judges, and BELEW,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

*Hon. David O. Belew, Jr.,
United States District Judge